IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 398

HORSMAN DOLLS, INC., a corporation of New Jersey,
Petitioner,
vs.
UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Unemployment Compensation Commission of New Jersey appears in the record at page 19a. The opinion of the Superior Court of New Jersey, Appellate Division, is reported in 9 N. J. Super. 101. The opinion of the Supreme Court of New Jersey, and the dissenting opinion, is reported in 7 N. J. (adv.) 541.

Jurisdiction.

The jurisdictional statement in the petitioner's brief (page 3) does not appear to conform to the requirements of Rule 12 (1) 3rd paragraph. *Southern Power Co.* v. *North Carolina Public Serv. Co.*, 263 U. S. 508, 68 L. ed. 413.

On September 19, 1951, the petitioner herein, secured an Order Allowing Appeal on petition for appeal presented to this Court. After the provisions of Rule 12(2) were complied with, a Statement Opposing Jurisdiction and Motion to Dismiss or Affirm was served on the appellant (petitioner herein) and filed by the appellee (respondent herein) in accordance with Rule 12(3). The appellant invoked the jurisdiction of this Court under Title 28 U. S. C. A. Section 1257(2), contending that N. J. Revised Statutes 43:21-6(b) Appendix herein, p. 21) was repugnant to the Constitution of the United States. This appeal is now pending before this Court.

The petitioner in these proceedings now attempts to invoke the jurisdiction of this Court under Title 28 U. S. C. A. Section 1257(3). The petitioner appears to rely on the contention that N. J. Revised Statutes 43:21-6(b) was improperly administered and as a result the petitioner was deprived of its constitutional rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Questions Presented.

1. Can the petitioner assert the violation of a constitutional right where its conduct barred relief by reason of laches and estoppel?

2. Can the petitioner assert the violation of a constitutional right without showing harm or injury?

3. Can the petitioner assert the violation of a constitutional right before exhausting the administrative remedies provided by N. J. Revised Statutes 43:21-6(c), (d), (e) and (i)?

Statute Involved.

The pertinent provisions of the Unemployment Compensation Law of New Jersey involved are printed in the Appendix herein, pp. 21-27.

Statement.

The Unemployment Compensation Law, adopted in 1936, imposed a tax upon all subject employers, which was uniform in rate until 1942 (N. J. Revised Statutes 43:21-7(a) and (b)), and directed the payment of benefits during and after 1939 (N. J. Revised Statutes 43:21-3(a)).

In the year 1942 and thereafter, an employer under subsections 7(c)(3) and (4) (Appendix herein, pp. 25-26) after three years of coverage retained his basic rate of 2.7 per cent or was assigned a merit rate of 1.8 per cent or 0.9 per cent, or assigned a penalty rate of 3.6 per cent, depending on his past employment experience.

The contribution rate assigned to the petitioner, Horsman Dolls, Inc., for the year 1942 was 3.6 per cent. In June, 1942, the petitioner received a notice of its contribution rate of 2.7 per cent for the year 1942. On January 8, 1943, an amended notice was mailed to the petitioner showing its rate to be 3.6 per cent for the year 1942, and on January 13, 1943, petitioner through its attorney wrote to the Commission advising it of the receipt of the amended notice and requesting a hearing on the ground that it disagreed with the assigned rate of 3.6 per cent. In answer to this communication, the Commission mailed to the attorney for petitioner, a form of Petition for Hearing which was executed by petitioner on March 9, 1943, and returned to the Commission (R10a-11a). Petitioner set out the following reason for its request for a hearing:

> "Petitioner contends that improper charges have been made against his account adversely affecting his rate."

The Commission scheduled a hearing to determine the nature and the merits of the petitioner's complaint. It was not until the hearing was considerably in progress that it was revealed that the petitioner wished all benefit charges made to its account (a factor in computing the rate N. J. R. S. 43:21-7(c)(4)) during the years 1939 to 1941, inclusive, erased without being required to first challenge in the tribunals constituted to hear and decide disputed claims for benefits under N. J. Revised Statutes 43:21-6(c), (d), (e) and (i) (Appendix herein, pp. 22-24), the propriety of the benefits paid. Petitioner took this position because it had not received notices of the decisions made by the deputy under subsection 6(b) (R163a-37-40; R232a-5-15; R233a-14-20), and insisted that it be assigned the lowest merit rate of 0.9 per cent.

After protracted litigation on another phase of this case, the Commission made its decision which in substance held: that the Commission did not have the power or right under the statute or under the facts of this case to erase the benefit charges made to the account of petitioner, Horsman Dolls, Inc.; that the petitioner had to exhaust its administrative remedies before the appellate tribunals constituted under N. J. Revised Statutes 43:21-6 which it failed to do; and that the contribution rate assigned to it for 1942 of 3.6 per cent was properly cast.

The Superior Court of New Jersey, Appellate Division, reversed the decision of the Commission, holding that the contribution rate of Horsman Dolls, Inc. for the year 1942, although correctly determined under the statute, was nevertheless invalid because of procedural irregularities in giving

notices to Horsman Dolls, Inc. of benefits allowed to the detached employees of the company during 1939 to 1941, inclusive, and which were paid and charged to its account. The fact that the employer did not dispute the merits of any benefit claims paid by the State was not considered or referred to in the Superior Court's Opinion.

The Supreme Court of New Jersey, resolving the doubt in favor of notice of the deputy's decisions, reversed the decision of the Appellate Division on the grounds that, (1) the petitioner had ample opportunity to challenge in the proper administrative tribunal the validity of the charges to its account, which it had not taken; (2) the petitioner, under the facts, could show no harm or injury; and (3) laches and estoppel in *pais* barred the relief sought by the petitioner.

The facts hereinafter briefly set forth were adduced at the hearing before the Commission.

When an employee of the petitioner was detached from his employment, during 1939 to 1941, inclusive, he reported to the local office of the Employment Service and filed an initial claim for benefits (R73a-30-38; Ex. P-2, R261a). The initial claim for benefits was transmitted to the central office of the Commission in Trenton where the claim was carefully checked against all reports and other information in the possession of the Commission (R74a-30-40; R75a-4-18). Then a "Notice to Employer of Claim for Benefits" (B-11) (Ex. P-9, R272a; Ex. P-14, R281a) was prepared in each instance when the claim was a valid one (claimant had earned $150 or more in his base year) and mailed, in duplicate, to the petitioner when it was the last employer, requesting it, if it had "any objections to payment" of the claim, to check the printed objections on the original and

return it (R57a-5-13; R210a-11-38; R216a-29-40; R218a-24-31; R220a-4-22). The petitioner received the aforementioned notices, but paid no attention to them (R141a-40).

The petitioner did not send separation notices (B-6) to the Commission, required under the latter's regulations when an employer had knowledge of conditions which would disqualify an employee from receiving benefits (Ex. P-16, R284a; R135a-20; Ex. C-1). Petitioner had possession of the regulations (R221a-4-7, 15-18).

The only witness, Robert I. Garnier, produced in behalf of the petitioner, and who was one of its executives, specifically testified as follows:

> "Q. At the last hearing you testified that all communications and notices, particularly from the taxing agencies of the State, are directed to your attention? A. Yes, sir." (R220a-36-40).
>
> "Q. And you also testified that by reason of the practice followed with your company that you received the regulations of the Commission? A. Yes." (R221a-5-8).

And the witness has previously testified as follows:

> "Q. Who took charge of them? A. Of the B-11's?
>
> "Q. Yes. A. Why I will answer this this way: In 1938, 1939 and 1940 I really paid no attention to them." (R132a-3-8).

This witness, Robert I. Garnier, further testified that the petitioner never responded to the B-11's or otherwise communicated with the deputy or the Commission, because the petitioner's business was seasonal in nature and was shut down at certain periods of the year; and that the petitioner had no objection to the payment of benefits because

there was no employment (R141a-40; R142a-5-14). He also testified that he, as the representative of the petitioner, would have known during the years 1939 to 1941, inclusive, whether any of the petitioner's detached employees were not entitled to benefits (R224a-24-32), and that he knew that some of petitioner's detached employees, including his own son, were receiving benefits (R236a-13-40).

When an employer responded to a B-11 or transmitted a separation notice (B-6), a notice of the disposition of the case by the deputy was always mailed to the employer (R100a-25-32; R112a-38-41; R113a-5-28; R147a-22-40; R148a-4-14; Ex. P-13, R279a-280a). The deputy testified that whenever any employer responded to a B-11, the claimant did not receive any checks before the employer was notified of the deputy's action or decision favorable to the claimant and of the employer's right of appeal (R84a-8-21).

The amended notice of experience rate received by petitioner in January, 1943, showed thereon the reasons for the change of its contribution rate. This notice showed that from 1936 to 1941, inclusive, it had paid contributions to the Commission in the sum of $48,929.26 and that benefits paid to its detached employees and charged to its account were in the sum of $98,203.34 (Ex. P-1, R9a, R149a-25-27).

Of the aforementioned benefits charged to the petitioner's account, $3,112.61 was paid to claimants when petitioner was not the last or most recent employer, and the sum of $1,750.76 at one stage of the hearing could not be allocated; however, if the petitioner's account was disburdened of the total ($4,863.37), its contribution rate of 3.6 per cent for 1942 would not be changed or altered (R179a-10-40; R180a-4-10).

Shortly after the transmission of the amended Notice of Employer Contribution Rate for the year 1942 (Ex. P-1, R9a) to petitioner and its request for a hearing thereon, petitioner received a breakdown of the benefit charges, etc., for the years 1939 to 1942, inclusive, on a separate form (B-110) (Ex. P-15, R283a; R143a-37) for each one of its employees who had received benefits during those years. Again, on November 1, 1943, petitioner through its attorney received an individual statement with respect to each benefit claim filed by each one of its detached employees during 1939 to 1941, inclusive, containing all the factors or elements of an "initial determination" and the benefits paid on each claim during those years (Ex. P-19, R281a; R246a-30-40; R247a-4-24; R249a-9-11).

No proof has ever been submitted by the petitioner to show that any detached employee was not entitled to receive his benefits.

ARGUMENT.

The record and briefs below show the petitioner contended, that notwithstanding its own inaction in the face of an excess of notice and although every charge against its account was justified on the merits, its account should not be charged with benefit payments because it did not receive the precise notice directed by N. J. Revised Statutes 6(b), and that this failure *ipso facto* justified the relief it sought.

The issues of Injury and Harm, Estoppel in *pais* and Laches, and Failure to Exhaust Administrative Remedies, were vigorously argued before the Supreme Court of New Jersey. That Court, after resolving the doubt in favor of

notice in line with petitioner's contention, decided every issue, aforementioned, in favor of the respondent. The Court held: that on the facts the petitioner was not injured or damaged (7 N. J. 541, 549, 551); that any delay in notice merely delayed the time within which the petitioner could take an appeal from deputy action (*ibid.* 551); that it was open to plaintiff to challenge in the administrative tribunal the validity of the charges to its account (*ibid.* 550) (See subsections 6(c), (d) and (e), Appendix herein, pp. 22-23, establishing administrative tribunals to hear appeals from deputy action); and that by reason of laches and estoppel in *pais* the petitioner was barred from the relief it sought (*ibid.* 552). The result reached by the Supreme Court of New Jersey on the facts and the law was inescapable.

The construction of the statute adopted by the Supreme Court of New Jersey and its interpretation of the scope of the law, particularly since it was not in conflict with the petitioner's contention, should be accepted as conclusive. *Osborne* v. *Florida*, 164 U. S. 650, 654; *Farncomb* v. *Denver*, 252 U. S. 7; *Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40; *Alton R. Co.* v. *Illinois Commerce Commission*, 305 U. S. 548.

I.

There is no Substantial Federal Question Involved.

Since the decision of the State court rests on adequate and independent state grounds sufficient to support the State court judgment, the petition for a writ of certiorari should be denied.

> *Enterprise Irrigation Dist.* v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164;

Public Service Commission v. *Wisconsin Telephone Co.*, 309 U. S. 657;
Washington v. *Inland Empire Refineries*, 311 U. S. 713;
Yakus v. *U. S.*, 321 U. S. 414, 444-447;
Herb v. *Pitcairn*, 324 U. S. 117, 125-126;
Phyle v. *Duffy*, 334 U. S. 431, 444;
Hammerstein v. *Superior Court of Cal.*, 341 U. S. 491, 492.

A.

Estoppel in *Pais* and Laches.

From the statement of facts, it is observed that during the years 1939 to 1941, inclusive, the petitioner, (1) conducted a seasonal business requiring the periodic layoff of its employees, (2) received Forms B-11 giving notice of the filing of benefit claims and ignored every one of them, (3) knew of the respondent's regulation requiring separation notices where the employer had knowledge of facts and conditions which would disqualify a benefit claimant, (4) knew that benefits were being paid to its detached employees but made no objections because it knew of none and had no knowledge of any disqualifying factors, (5) at no time after receiving its first notice of contribution rate in June, 1942, or after receiving its amended notice in January, 1943, which notices contained a summary statement of benefits paid, and at no time after receiving detailed or breakdown statements in 1943 covering each benefit claim and the action taken thereon, initiated any administrative appeals to review any benefit allowance, and (6) made no effort or attempt in the hearing before the Commission to impugn or contest the validity or propriety of any benefits paid to any one of its detached employees, assuming that the Commission had authority to inquire into and review such benefit determinations.

A court will refuse its aid to one who remains silent when duty, candor and fair dealing require him to speak out. This principle is predicated upon the neglect of a duty implicit in fairness, candor and ordinary decency. The petitioner takes the position that it is not to be penalized for its silence but rather is entitled to capitalize on it and thereby make itself the recipient of a windfall resulting from the erasure of all the benefits charged to its account and such refund payments as would necessarily follow.

The decision of the Supreme Court of New Jersey upon the ground of estoppel and laches finds full support in the record and is one of the reasons why the Petition should be denied.

Moran v. *Horsky,* 178 U. S. 205, 208 (on laches);
Preston v. *Chicago,* 226 U. S. 447, 450 (on laches);
Wood v. *Chesborough,* 228 U. S. 672, 676-680 (on laches);
Enterprise Irrigation Dist. v. *Farmers' Mut. Canal Co., supra* (on estoppel);
Utley v. *St. Petersburg,* 292 U. S. 106, 111-112 (on estoppel);
McSweeney v. *Equitable Trust Co.,* 127 N. J. L. 299, appeal dismissed 315 U. S. 785 (on estoppel).

In *R. H. Stearns Co.* v. *U. S.* (1933), 291 U. S. 54, this Court said (p. 62):

> "* * * no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. Imperator Realty Co. *v.* Tull, 228 N. Y. 447, 127 N. E. 263, *supra.* A suit may not be built on an omission induced by him who sues. Swain *v.* Seamens, 9 Wall. 254, 274, 19 L. ed. 554, 560; United States *v.* Peck, 102 U. S. 64, 26 L. ed. 46; * * *."

In the case of *Enterprise Irrigation Dist.* v. *Farmers' Mut. Canal Co., supra,* where the non-Federal ground of estoppel in *pais* supported the state court judgment, this Court said (bottom p. 164):

> "* * * where the non-Federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-Federal questions."

And similarly, in the case of *Utley* v. *St. Petersburg, supra,* where the non-Federal ground of estoppel and laches supported the state court judgment, this Court said (p. 111):

> "Finally, the appellants are barred, or so the Supreme Court of Florida has held, by laches and estoppel. They stood by without opposition while the property was improved. They refrained from making use of remedies, both administrative and judicial, that were ready to their call. For nearly five years they held aloof without word or act of protest, and then invoked the aid of equity. Following Abell *v.* Boynton, 95 Fla. 984, 117 So. 507, and other state decisions, the Supreme Court of Florida withheld an equitable remedy from suitors who had slept upon their rights. By force of that ruling, the decree of the state court rests upon a non-federal ground broad enough to support it."

B.

Harm and Injury.

The benefits paid to the petitioner's detached employees, resulting in the charges made to the petitioner's account, were justified on the merits. The seasonal nature of its business compelled periodic layoffs, and there were no objections or reasons for disqualification which the petitioner could advance. The petitioner has taken the position that

the mere failure to receive the precise statutory notice constituted sufficient harm and injury to entitle it to relief. The Supreme Court of New Jersey held that to be entitled to relief the petitioner must make a demonstration of material or substantial harm or injury by reason of such failure. Since the decision of the State court also rested on this adequate and independent State ground sufficient to support the State court judgment, the Petition should be denied.

> *Lewis* v. *Reynolds*, 284 U. S. 281;
> *R. H. Stearns Co.* v. *U. S.*, *supra;*
> *U. S.* v. *Jefferson Elec. Mfg. Co.*, 291 U. S. 386;
> *Peoples Banking Co.* v. *Sterling*, 300 U. S. 175, 184;
> *Stone* v. *White*, 301 U. S. 532;
> *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295, 301.

In the case of *Peoples Banking Co.* v. *Sterling, supra,* with respect to the burden cast on a litigant who claims himself harmed through the operation of a statute, the Court said (p. 184):

> "* * * At all events, the burden was on the appellants to show themselves harmed through the operation of the statute challenged as unlawful. Premier-Pabst Sales Co. *v.* Grosscup, 298 U. S. 226, 227, 80 L. ed. 1155, 1156, 56 S. Ct. 754; New York ex rel. Hatch *v.* Reardon, 204 U. S. 152, 160, 161, 51 L. ed. 415, 422, 423, 27 S. Ct. 188, 9 Ann. Cas. 736."

The relief which the petitioner sought in the State court proceedings was a refund of taxes through a reduction of its contribution rate. The contributions payable under the Unemployment Compensation Law of New Jersey are taxes. *Singer Sewing Machine Co.* v. *N. J. Unemployment Compensation Commission* (E. & A., 1943), 128 N. J. L. 611, 619, aff'd 130 N. J. L. 173. A suit for refund of taxes is in

the nature of an action in assumpsit, for money had and received, and a plaintiff in such suit may recover only if he shows that more taxes have been paid than in equity and good conscience should be retained by the collecting agency. *Stone* v. *White, supra; Lewis* v. *Reynolds, supra;* and this rule applies even when the action is provided by statute. *U. S.* v. *Jefferson Elec. Mfg. Co., supra.*

With respect to the charges ($4,863.37) made to the petitioner's account when it was the base year employer, the record shows that if all such charges were actually erased from its account, its contribution rate of 3.6 per cent for 1942 would not be changed or altered (R179a-10-40; R180a-4-10). The petitioner's contention that while these charges were not critical with respect to the rate for 1942 they might become critical with respect to the determination of the petitioner's rate at some undefined time in the future, is founded on mere conjecture and is untenable. *Gange Lumber Co.* v. *Rowley,* 326 U. S. 295.

In the case of *Gange Lumber Co.* v. *Rowley, supra,* the plaintiff's tax rate depended in part on the benefits paid to its employees under the provisions of the Workmen's Compensation Law of Washington. The company argued that an amendment to the Law which operated to revive the barred right of an employee to seek an additional award of workmen's compensation would affect its future rate. The Court in rejecting this contention said (p. 305):

> "In sum, all that the record discloses is that this amount will be charged against the appellant's experience and taken into account with other factors, as the statute requires, in the computation for some future period, with possibly some increase resulting in the rate. But, in the absence of all evidence showing the facts concerning the other factors, it is en-

tirely problematical whether an increase will follow or, if so, whether it will be wholly mathematical and infinitesimal or substantial in its ultimate effect upon appellant. *This being so, appellant's complaint comes down, on the record, to nothing more than the bare possibility of some injury in the future.*" (Italics ours).

C.

Failure to Exhaust Administrative Remedies.

The casting of contribution rates is a mandatory administrative function under the provisions of subsections 7(c)(3), (4) and (5) of the statute (Appendix herein, pp. 25-26).* The consideration and determination of benefit rights to disemployed individuals is solely within the jurisdiction of the deputy and the tribunals constituted under the provisions of N. J. Revised Statutes 6(b), (c), (d) and (e) (Appendix herein, pp. 21-23). N. J. Revised Statutes 43:21-10(d) directed the appointment of "a board of review, consisting of three members whose duties shall be to act as a final appeals board in cases of dispute and to whom shall be delegated the duty of supervising the work of local appeal tribunals to be organized as provided for elsewhere in this chapter." The Commission has no power to determine or review, the propriety or validity of any decisions of the deputy, the appeal tribunals or the Board of Review, respecting benefit payments upon which charges to an em-

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* The factors of the formula which determined an employer's contribution rate were:

(1) The period of coverage of an employer (7(c)(3));

(2) The relationship between the balance (contributions less benefits) in an employer's account and his average annual payroll (7(c)(4)); and

(3) The relationship between the total assets of the fund and the total benefits paid from the fund within the last preceding calendar year (7(c)(5)).

ployer's account are based. *Henry A. Dreer, Inc.* v. *Unemployment &c. Com.*, 127 N. J. L. 150, 151 (N. J. Sup. Ct., 1941). See also, *American Grocery Co.* v. *A & W Wine &c. Corp.*, 131 N. J. L. 383 (N. J. Sup. Ct., 1944). The powers of the Commission under subsection 7(c) and the powers of the tribunals under section 6 are separate and distinct.

It is apparent that the petitioner not only failed to exhaust adequate administrative remedies provided by the State statute, but refrained and refused to avail itself of such remedies. This is another independent State ground sufficient to support the State court judgment, and another reason why the Petition should be denied.

Mellon Co. v. *McCafferty*, 239 U. S. 134, 136;
First Nat. Bank v. *Weld County*, 264 U. S. 450, 453-456;
Utley v. *St. Petersburg, supra;*
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, 51;
Rochester Telephone Corp. v. *U. S.*, 307 U. S. 125;
Yakus v. *U. S., supra;*
U. S. v. *Ruzicka*, 329 U. S. 287, 290, 294-295;
Lichter v. *U. S.*, 334 U. S. 742, 790-792;
Slocum v. *Delaware, L. & W. R. Co.*, 339 U. S. 239.

In the case of *First Nat. Bank* v. *Weld County, supra*, this Court, after quoting a part of the opinion of the Supreme Court of Colorado which construed the remedies provided for in a Colorado tax statute that were not exhausted by the plaintiff in that case, said (p. 454):

> "The effect of this is to hold that an administrative remedy was in fact open to plaintiff under the statutes of the state, and by this construction, upon well-settled principles, we are bound. (Citations)."

The principle which is followed with respect to the exhaustion of administrative remedies, is clearly set out in the case of *Yakus* v. *United States, supra* (p. 444):

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil *v.* Vermont, 144 U. S. 323, 331, 36 L. ed. 450, 455, 12 S. Ct. 693; Barbour *v.* Georgia, 249 U. S. 454, 460, 63 L. ed. 704, 707, 39 S. Ct. 316; Whitney *v.* California, 274 U. S. 357, 360, 362, 380, 71 L. ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken."

In the tax case of *Mellon Co.* v. *McCafferty, supra,* wherein the administrative remedies provided by law were not followed, this Court said (pp. 138, 139):

> "* * * To avoid this difficulty in the argument it is insisted that a resort to these remedies was not required because they would have been unavailing, in view of the nature of the wrong complained of. But the duty to resort to the adequate remedies provided could not be escaped by assuming that if they had been resorted to, the wrong complained of would not have been rectified."

The Petitioner's Citations.

The petitioner asserts (Petition, p. 14) that "other states which have passed on similar questions have held contrary to the decision below." Citing, *Juster Bros., Inc.* v. *Christgau,* 214 Minn. 108, and *Bell-Brook Dairies, Inc.* v. *Bryant,* 35 Cal. (2d) 404. The construction of the statute

of each state is of course left to the courts of each particular state; however, an examination of the aforementioned cases shows that they are dissimilar.

In both cases no notices of claims for benefits were given at any time to the employers involved,—in the *Bell-Brook* case because of pressure of work and lack of personnel in the California agency, in the *Juster Bros., Inc.* case because the agency had not received separation notices from the employer. The employer in each case was not barred by estoppel and laches because it never knew that claims had been filed or that benefits were paid. Furthermore, it is to be noted that in each case the employer invoked and exhausted the administrative remedies provided by the State statute.

The petitioner relies on *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, and *Morgan* v. *United States,* 304 U. S. 1, to support its Petition (pp. 12, 17). As a matter of fact, these cases support the position of the respondent rather than that of the petitioner. Administrative remedies were available to petitioner, but it refrained and refused to avail itself of such remedies. The petitioner could have secured a full and complete hearing on all benefit allowances before the tribunals constituted under section 6 of the statute.

The case of *Wuchter* v. *Pizzutti,* 276 U. S. 13 (Petition, p. 14), involves a statute void because it failed to provide for the giving of notice of process in a judicial proceeding instituted against a non-resident defendant-user of a state highway and is not in point.

The case of *Ohio Bell Teleph. Co.* v. *Public Utilities Com.,* 301 U. S. 292 (Petition, p. 15) is not pertinent. In this case, the Utilities Commission determined value of the

utility company's system without reference to any evidence in the record before it and "upon proofs drawn from the clouds." Since there was no warning that the Utilities Commission would not rely on the evidence of value of property adduced before it, the Court held that it would not presume acquiescence or consent to the course taken by the Commission.

In *Mullane* v. *Central Hanover B. & T. Co.*, 339 U. S. 306 (Petition, p. 14), the company, after filing its petition for judicial settlement of its accounts covering small trust estates pooled into one common fund for investment administration under a New York statute, gave notice only by publication in a local newspaper as prescribed by the statute. Said notice set forth only the name and address of the trust company, the name and date of the establishment of the common trust fund and a list of the participating estates. The known beneficiaries of the separate trusts never received any direct notice nor had any way of knowing by the published notice that they were affected. This Court held that the prescribed statutory notice by publication was insufficient as to the known beneficiaries.

The petitioner suggests, citing *Moser* v. *United States*, 341 U. S. 41 (Petition, p. 15), that there was a shift in the forms used by the deputy whereby it was prejudiced. This assertion disregards the facts which form the basis of the non-Federal grounds of decision and which for expediency will not be repeated or referred to here. The *Moser* case involved unusual circumstances. In that case this Court held that a Swiss citizen did not waive his right to become an American citizen under the Selective Training and Service Act where his application for exemption from military service was on a form which, pursuant to negotiations be-

tween the Swiss Legation and the State Department, did not contain the usual formal waiver of the signer's rights of citizenship and was signed only after the Swiss Legation had advised him that he thereby did not waive his right to apply for American citizenship.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

HERMAN D. RINGLE,
Attorney and Counsel for Respondent.

CHARLES A. MALLOY,
Chief Counsel for Respondent.

THEODORE D. PARSONS,
Attorney General of New Jersey.

JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

Dated: November 9, 1951.

APPENDIX.

From Unemployment Compensation Law
Reprint of June 2, 1941.

Claims for Benefits.

N. J. Revised Statutes.

43:21-6. (a) Filing.—Claims for benefits shall be made in accordance with such regulations as the commission may approve. Each employer shall post and maintain printed statements of such regulations in places readily accessible to individuals in his service and shall make available to each such individual at the time he becomes unemployed, a printed statement of such regulations. Such printed statements shall be supplied by the commission to each employer without cost to him.

(b) Initial determination.—A representative designated by the executive director, and hereinafter referred to as a deputy, shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim or any question involved therein to an appeal tribunal or to the board of review, which shall make its determinations with respect thereto in accordance with the procedure described in subsection (c) of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of subsection (d) of section 43:21-5 of this title, the deputy shall promptly transmit his full findings of fact with respect to that subsection to the board of review, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit

to the deputy a decision upon the issues involved under that subsection. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. Unless the claimant or any such interested party, within five calendar days after the delivery of such notification, or within seven calendar days after such notification was mailed to his last-known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the board of review, shall be paid only after such determination; *provided,* that if an appeal tribunal affirms a decision of a deputy, or the board of review affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid.

(c) Appeals.—Unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision of the board of review, unless within ten days after the date of notification or mailing of such decision, further appeal is initiated pursuant to subsection (e) of this section.

(d) Appeal tribunals.—To hear and decide disputed claims, the executive director with the approval of the commission shall establish one or more impartial appeal tribunals consisting in each case of either a salaried examiner or a body consisting of three members, one of whom shall be a salaried examiner, who shall serve as chairman,

one of whom shall be a representative of employers and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the commission and be paid a fee of not more than twenty dollars ($20.00) per day of active service on such tribunal plus necessary expenses. No person shall participate on behalf of the commission in any case in which he is an interested party. The executive director may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. The chairman shall act alone in the absence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the chairman of the appeal tribunal is present.

(e) Board of review.—The board of review may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The board of review shall permit such further appeal by any of the parties interested in a decision of an appeal tribunal which is not unanimous and by the deputy whose decision has been overruled or modified by an appeal tribunal. The board of review may remove to itself or transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal. Any proceeding so removed to the board of review shall be heard by a quorum thereof in accordance with the requirements in subsection (c) of this section. The board of review shall promptly notify the interested parties of its findings and decision.

(f) Procedure.—The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings

and appeals shall be in accordance with rules prescribed by the board of review for determining the rights of the parties, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded, but need not be transcribed unless the disputed claim is further appealed.

(g) Witness fees.—* * *

(h) Appeal to courts.—* * *

(i) Court review.—Within ten days after the decision of the board of review has become final, any party aggrieved thereby may secure judicial review thereof by writ of certiorari directed to the board of review, in which action any other party to the proceeding before the board of review shall be made a defendant.

CONTRIBUTIONS.

43:21-7(a) * * *

(b) * * *

(c) Future rates based on benefit experience: (1) A separate account for each employer shall be maintained and this shall be credited with all the contributions which he has paid on his own behalf. But nothing in this chapter shall be construed to grant any employer or individuals in his service prior claims or rights to the amounts paid by him into the fund either on his own behalf or on behalf of such individuals. Benefits paid to an eligible individual shall be charged against the account of his most recent employers against whose accounts the maximum charges hereunder have not previously been made in the inverse

chronological order in which the employment of such individual occurred, but the maximum amount so charged shall not exceed one-sixth of the wages payable to such individual by each such employer for employment on and after the first day of the nine completed calendar quarters immediately preceding such individual's benefit year, or two hundred forty dollars ($240.00), whichever is the lesser, but this provision shall not be construed to limit the duration of benefits payable pursuant to subsection (d) of section 43:21-3 of this title. The commission shall by general rules prescribe the manner in which benefits shall be charged against the accounts of several employers for whom an individual performed employment during the same week.

(2) The commission may prescribe regulations for the establishment, maintenance, and dissolution of joint accounts by two or more employers, and shall, in accordance with such regulations and upon application by two or more employers to establish such an account, or to merge their several individual accounts in a joint account, maintain such joint account as if it constituted a single employer's account.

(3) Each employer's rate shall be two and seven-tenths per centum (2 7/10%), except as otherwise provided in the following provisions. No employer's rate shall be less than two and seven-tenths per centum (2 7/10%) unless and until there shall have been three calendar years throughout which any individual in his employ could have received benefits if eligible.

(4) Each employer's rate for the twelve months commencing January first of any calendar year shall be determined on the basis of his record up to the beginning of such calendar year. If, at the beginning of such calendar

year, the total of all his contributions, paid on his own behalf, for all past years exceeds the total benefits charged to his account for all such years, his contribution rate shall be:

(A) One and eight-tenths per centum (1 8/10%), if such excess equals or exceeds seven and one-half per centum (7½%), but is less than ten per centum (10%) of his average annual payroll (as defined in paragraph (2) subsection (a) of section 43:21-19 of this title);

(B) Nine-tenths of one per centum (9/10 of 1%), if such excess equals or exceeds ten per centum (10%) of his average annual payroll.

If the total of his contributions, paid on his own behalf for all past periods or for the past one hundred and twenty consecutive calendar months, whichever period is more advantageous to such employer for the purposes of this paragraph, is less than the total benefits charged against his account during the same period, his rate shall be three and six-tenths per centum (3 6/10%).

(5) No employer's rate for the period of twelve months commencing January first of any calendar year shall be less than two and seven-tenths per centum (2 7/10%) unless the total assets of the fund, excluding contributions not yet paid at the beginning of such calendar year, exceed the total benefits paid from the fund within the last preceding calendar year; and no employer's rate shall be less than one and eight-tenths per centum (1 8/10%) unless such assets at such time were at least twice the total benefits paid from the fund within such last preceding year.

Appendix.

BENEFIT ELIGIBILITY CONDITIONS.

43:21-4. An individual, totally or partially unemployed, shall be eligible to receive benefits with respect to any week only if it appears that:

(a) * * *

(b) * * *

(c) * * *

(d) * * *

(e) He has within his base year earned wages of not less than one hundred fifty dollars ($150.00). (As amended by chapter 114, P. L. 1941. Effective May 19, 1941)

DEFINITIONS.

43:21-19. As used in this chapter, unless the context clearly requires otherwise:

(a) * * *

(b) * * *

(c) * * *

(d) * * * Any claim for benefits made in accordance with section six (a) of this act shall be deemed to be a "valid claim" for the purposes of this subsection if the individual has fulfilled the condition imposed by section four (e).